

# Town of Frederick Board of Trustees



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AM 2009-097

## REQUEST TO AMEND THE SPINDLE HILL ENERGY CENTER DEED OF CONSERVATION EASEMENT


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**Agenda Date:** October 13, 2009

**Attachments:**

- a. Letter of Inquiry from Invenergy
- b. Conservation Easement
- c. Johnson Farms / Spindle Hill Minor Subdivision Plat
- d. Johnson Farms / Spindle Hill Zoning / PUD Plat

**Fiscal Note:** None noted

  
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Marcia Lierman, Finance Director

**Submitted by:**   
\_\_\_\_\_  
Todd Tucker, Staff Planner

**Approved for Presentation:**   
\_\_\_\_\_  
Derek Todd, Town Administrator

**AV Use Anticipated** Projector   X   Laptop       

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**Certification of Board Approval:**

\_\_\_\_\_  
Town Clerk

\_\_\_\_\_  
Date

**Summary Statement:** Invenergy desires to install a small photovoltaic solar power generation demonstration and education field within Outlot 3 of Johnson Farms / Spindle Hill Energy Center Subdivision adjacent to the existing Spindle Hill Power Plant. Since the Town holds a conservation easement to Outlot 3, the Town Board must agree to negotiate amendments the conservation easement in order for the photovoltaic solar power field to be considered.

Staff seeks the Board's direction with regard to negotiating amendments to the existing conservation easement to allow for a proposed photovoltaic solar power generation field within Outlot 3. Note that direction to negotiate revisions to the conservation easement does not guarantee approval of the

contemplated activity. All proposed revisions to the conservation easement require Board approval before an application for the use could be considered by the Planning Commission or Board of Trustees. Denial of this request would preclude further consideration of the contemplated activity within the conservation easement.

**Detail of Issue/Request:** In 2006 and 2007, the Town approved the annexation, subdivision, a conservation easement, and site plan related to the development of a proposed gas powered peaking power plant in Lot 2 of the Johnson Farms / Spindle Hill Energy Center. Significant landscaping and other mitigation measures were proposed and installed by Invenergy to ensure compatibility between the then proposed peaking power plant and the surrounding neighborhood. The surrounding neighborhood includes the AMOCO natural gas processing plant, the Pan Energy propane gas plant, and a few dispersed residences on agricultural lands. The Invenergy peaking power plant has been in operation since 2006.

Invenergy recently proposed to provide for green energy within portions of Outlot 3 by installing a photovoltaic solar power demonstration site which could also provide renewable energy to the Town. The subject parcel is zoned agricultural and is not within the PUD Overlay. The use could be consistent with the agricultural zoning as a resource extraction, process, and sales establishment provided it is consistent with the applicable requirements of the Conditional Use process and Land Use Code.

Currently, the Conservation easement defines and limits uses within Outlot 3 as follows:

1. **Purpose.** The purpose of this Conservation Easement is to assure that the Property will be retained forever predominantly in its natural open space condition for recreational and educational purposes and to prevent any use of the Property that will significantly impair or interfere with the Conservation Values of the Property. Grantor intends that this Conservation Easement will confine the use of the Property to such activities, including public recreation or education, as are deemed consistent with the purpose of this Conservation Easement and provisions of the Town Land Use Code by the Town. This purpose is in accordance with §170(h) of the IRC and C.R.S. Sections 38-30.5-101 *et seq.* In order to achieve this purpose, Grantor intends to convey this Conservation Easement to Grantee to ensure that the Conservation Values of the Property will be preserved and protected forever.

2. **Intent.** Subject only to the purposes set forth above, the intention of the parties is to permit all other uses of the Property that are not inconsistent with the preservation and protection of the Conservation Values and which are not expressly prohibited herein.

4. **Rights of Grantee.** To accomplish the purpose of this Conservation Easement the following rights are hereby conveyed to Grantee:

(a) To preserve, protect or enhance the Conservation Values of the Property;

(b) To enter upon the Property in order to monitor compliance with and otherwise enforce the terms of this Conservation Easement;

(c) To enter upon the Property and install and maintain parks, trails, ball fields and other recreational or open space uses in accordance with the Conservation Values, as undertaken by or as reasonably approved by Grantee, including the right to permit public access to the Property in accordance with the provisions of Section 18 below; and

(c) To prevent any activity on or use of the Property that is inconsistent with the purpose of this Conservation Easement and to require the restoration of such areas or features of the Property that may be damaged by any inconsistent activity or use, pursuant to the remedies set forth in Sections 11, 12 and 13.

5. **Prohibited Activities.** Any activity on or use of the Property inconsistent with the purpose of this Conservation Easement is prohibited. Without limiting the potential for public recreation and educational activities, uses other than those related to the proposed power plant project of Grantor to be located adjacent to the Property, as approved (the "Project"), are prohibited, unless expressly approved by Grantee.

6. Reserved Rights. Grantor reserves to itself and to its successors, and assigns, all rights accruing from their ownership of the Property, including the right to engage in all uses of the Property that are not expressly prohibited herein and are not inconsistent with the purpose of this Conservation Easement. Without limiting the generality of the foregoing, and subject to the terms of Section 5, the following rights are expressly reserved:

(a) Installation and maintenance of and access to overhead transmission lines and the right to grant easements therefore, as associated with the Project or other facilities or uses approved by the Town and in accordance with the provisions of the Town Land Use Code;

(b) Installation and maintenance of and access to underground utilities as approved by the Town, including the right to grant easements for sanitary sewer, water lines, electric, cable, broad-band and telephone transmission, storm drainage and construction access easements across the Property allowing Grantor or its assignees the right to install and maintain such utilities on the Property and to accommodate storm drainage from Grantor's adjacent property;

(c) Installation and maintenance of fencing, berming and landscaping in connection with the Project;

(d) Temporary use of areas of the Property for storage and equipment laydown during the construction of the Project; and

(e) Rights of way or easements for access to adjacent properties, as approved by the Town.

In the event the surface of the Property is disturbed by Grantor or its assigns in connection with a reserved use as described above, Grantor or its assigns shall restore the surface of the Property reasonably to the grade and condition it was in immediately prior to such activity, except as may be necessary to accommodate the reserved use and shall maintain the Property in a weed free, native condition in accordance with the Town Land Use Code.

As noted above, educational uses are permitted in the conservation easement (paragraph 5). However, in order for the proposed solar generation use to be considered within the Outlot, it must be expressly approved by the Trustees (see also paragraph 5). Please note that there is a public perception that Outlot 3 will be persevered, and accordingly, the public should receive something of value in exchange for the loss of preserved lands.

Direction to negotiate amendments to the Conservation Easement does not guarantee any particular outcome, as any amendments to the Conservation Easement require approval by the Trustees. In addition, the use is subject to the provisions of the Land Use Code, including but not limited to the Conditional Use process. The Conditional Use Review process requires consideration in a public hearing before the Planning Commission and a public meeting before the Board of Trustees for a determination of approval, denial, or conditional approval prior to implementation.

**Legal/Political Considerations:** In general, a solar generation facility within the conservation easement likely diminishes the recreational value of the land as the proposed use may not be consistent with preserving the site as an open space buffer or using it for recreation as noted in par. 4(c) of the Conservation Easement. The attorney's office does not see a reasonable basis to permit the commercial arrangement that Invenergy proposes under the current language of the Conservation Easement. However, the Town may consider the contemplated activity provided substantial benefits to the public are implemented, including a significant educational component. For the use to be considered there would need to be a substantial quid pro quo for this proposal to not run afoul of the public's expectations and rights under the Agreement.

**Alternatives/Options:**

**ACTIONS:** The Board of Trustees may consider several options regarding the proposal to amend the conservation easement including:

- ☐ Directing staff to negotiate amendments to the Conservation Easement with Invenergy;
- ☐ Denial of the request to consider amending the Conservation Easement;

**Financial Considerations:** None noted.

**Staff Recommendation:** Staff recommends that the Board direct staff to negotiate amendments to the conservation easement in consideration of a potential photovoltaic solar power demonstration and education site as generally described in Invenergy's letter dated September 16, 2009.

Note that the amendments to the Conservation Easement require approval by the Board, and any subsequent Conditional Use application would be considered per the provisions of the Land Use Code.